[Case Title] In re: C.J. Rogers, Inc., Debtor
[Case Number] 91-20388
[Bankruptcy Judge] Arthur J. Spector
[Adversary Number]XXXXXXXXXX
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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

In re: C.J. ROGERS, INC., Case No. 91-20388
Chapter 7

Debtor.
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**OPINION REGARDING EMPLOYMENT OF AND APPLICATION FOR COMPENSATION OF PULLIAM, GRAVES & FOGEL**

On January 25, 1993, William Grabscheid, the trustee of this chapter 7 estate, filed an *ex parte* application to employ the law firm of Pulliam, Graves & Fogel as special environmental counsel. The application was supported by the affidavit of Lola Glass Graves, a partner in the firm, who was designated in the application as ?the primary attorney" for the engagement. Because the application bore the endorsement of the United States trustee, it was approved in the routine perfunctory fashion in an order dated January 26, 1993.

On August 9, 1993, Pulliam, Graves & Fogel filed an application for compensation as special counsel to the trustee. After the notice period for objections had expired and no party in interest or the United States trustee filed any objection, the order allowing the compensation came to me for signing.

In contrast to United States trustee-approved applications for

approval of employment, however, I scrutinize requests for compensation before signing an order. With the fee application before me, the enormity of the problem became apparent. Noting that?[t]he prospect of signing an order allowing that firm compensation has caused the Court to reconsider the appointment," on September 15, 1993, I ordered the trustee and invited the United States trustee and the firm to show cause why I should not set aside the January 26, 1993 order and why if I did not do so, I should not nonetheless disqualify myself from passing upon the fee application.

It is fairly obvious that disqualification would be required if a judge of this Court has a financial interest--direct or indirect--in any matter before another judge of this Court. And the proposition that a husband ordinarily benefits from any compensation paid to his wife is one which cannot seriously be questioned. Implicitly recognizing this truism, the Canons of Ethics and several advisory opinions treat the judge and his or her spouse as indistinguishable. *See, e.g.,* Canon 3C(1)(c); Advisory Opinion No. 68; Advisory Opinion No. 27 (a judge should disqualify himself because his spouse's indirect financial interest in matter in dispute creates an appearance of impropriety); Advisory Opinion No. 58 (a judge generally should disqualify herself from hearing a case in which a party is represented by a law firm in which the judge's spouse is a member).

My primary objective in scheduling a hearing was to determine whether there were any circumstances that might mitigate the appearance of impropriety created by this situation. For example, perhaps the Graves are

no longer living together as husband and wife; or perhaps they have separate financial affairs; or perhaps even though she is a partner in the firm, Ms. Graves receives no part of the compensation earned by the firm for its work in this case. Based on the facts known to the parties, but not the Court, it is possible that the parties or the United States trustee had already researched the legal and ethical implications and had decided that there was no impediment to the appointment.[1]

Furthermore, aside from the ethical implications involved in this case, there are statutes and official court rules which are implicated. *E.g.,* 11 U.S.C. §327, F.R.Bankr.P. 5002, 5004. Courts generally seek the positions and assistance of the parties before ruling on judicial matters. Indeed, had a party objected to the original *ex parte* application for approval of the law firm's employment or moved for my disqualification, the argument would surely have been in open court.

Another purpose for the hearing was to determine if it would be equitable to set aside the appointment order.[2] One factor relevant to this

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[1]The fee application of Hertzberg & Golden, the trustee's general counsel at the time of the appointment of special counsel, discloses that an unusual amount of time (at least 3.7 hours) was spent on the proposed appointment of special counsel. This shows that at least the trustee was aware of a problem with this appointment. However, neither the application nor the accompanying affidavit put the Court on notice that any problem existed.

[2]That a court has the power to apply §455(a) retroactively to correct its own error when a ground for recusal becomes known is not in doubt. *See Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 861, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988).

determination is whether the United States trustee was advised of the law firm's connection to Judge Graves when that office endorsed the order approving the firm's employment. The hearing would have allowed me to ascertain whether the United States trustee's consent was fully informed. For the reasons which follow, however, I have decided that the hearing is unnecessary.

With respect to the latter issue, the question of whether it would be equitable to set aside the January 26th order presupposes that it was inappropriate for me to sign the order in the first instance. And if that is the case, then it would be just as inappropriate for me to evaluate the fairness of an order setting it aside. The more logical procedure under such circumstances is for me to simply recuse myself, with the newly designated judge determining whether the order approving the law firm's employment should be set aside.

As for the other reason for a hearing, evidence that compensation to the firm could not even indirectly benefit Judge Graves would tend to mitigate the appearance of impropriety that this situation presents. However, since entry of the show-cause order I have engaged in further research and reflection which leads me to the conclusion that, even if Judge Graves would derive no direct or indirect financial benefit whatsoever from any compensation to be awarded to Pulliam, Graves & Fogel, I must nonetheless recuse myself.

The rationale for disqualification arises from the broadly held

view that human beings (and thus presumably judges) might have a tendency to favor persons whom they know or with whom they have a certain type or level of relationship. Community and legal norms are such that any action that smacks of self-dealing is properly suspect. The "self" in self-dealing is in my view broadly defined, and includes those who have (and who are close to those who have) a relationship in which there exists ongoing (rather than casual) common duties and responsibilities, a community of interests, and the requirement or contemplation of at least occasional joint action. Such fairly describes the relationship between and among the bankruptcy judges in a multiple judge district.

F.R.Bankr.P. 5004(b) prohibits judicial approval of "compensation to a person . . . with whom the judge is so connected as to render it improper for the judge to authorize such compensation." Bankruptcy Rule 5004(a) adopts and applies 28 U.S.C. §455(a) generally to bankruptcy proceedings and contested matters. That statute provides:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The standard set forth in §455(a) is an objective one, based on a reasonable observer's belief about the judge's impartiality rather than the judge's own estimation as to his ability to impartially hear a case or proceeding. *See, e.g., Roberts v. Bailar,* 625 F.2d 125, 129 (6th Cir. 1980); *Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1115 (5th Cir. 1980), *cert. denied,* 449 U.S. 820, 101 S. Ct. 78, 66 L.Ed.2d 22 ( ?Under section 455(a), the

judge is under a continuing duty to ask himself what a reasonable person knowing all the relevant facts would think about his impartiality. If there is a reasonable factual basis for doubting the judge's impartiality, . . . [he] should disqualify himself. . . ."); *In re Fulgham Enterprises, Inc.*, 37 B.R. 577, 579 (Bankr. E.D. Mich. 1984) ("Ultimately, this type of determination is informed by a sensitive concern for public confidence in the judiciary . . . will the creditors, and the public generally, reasonably question this Court's impartiality?").

There are actually three types of connections to be examined here. First, there is the connection between a judge and his or her spouse. And the fact that bride and groom typically marry their financial fortunes only partially accounts for the concern regarding a judge's impartiality in situations like this. The other major consideration, of course, relates to the close emotional bond between husband and wife. In a healthy marriage, each spouse experiences the triumphs and setbacks of the other almost as if they were his/her own. Thus, even aside from financial concerns, the connection between a judge and his or her spouse is so close that their interests are nearly impossible to separate.

The second connection is that between one judge of the Court and another. Although there is no opinion by the Committee on Codes of Conduct,[3] directly on point, there are opinions on analogous situations

[3]This Committee is charged with interpreting the Code of Conduct for United States Judges. It has formerly been known as the Interim

which shed light on the issue here.

In Advisory Opinion No. 38, the Committee recognized that "if the judge has been on the bench for a number of years or if he is a close friend of one or more members of the bench, an additional problem may arise relating to the . . . appearance [of a relative of one of the judges] before the judges of the court."

In Advisory Opinion No. 70, the Committee suggested a method of determining whether a judge should disqualify herself when the attorney appearing before her is a former colleague on the bench. The Committee advised that

> [w]hether personal relationship with a former colleague would require disqualification depends on the particulars of that relationship . . . Does the judge feel capable of disregarding the relationship? Can others reasonably be expected to believe the relationship is disregarded? . . . In applying that test, the judge should consider the closeness of the relationship, the length of service together, the size of the bench, the period that has elapsed since the former judge left the bench and the nature of the litigation . . . .
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> In a large court, relationships may not have been close. If the former judge has been a colleague for a short time, it may be easier to disregard the relationship, and more likely that litigants will feel it can play no part in the decision. Where the relationship between the sitting and former judge has

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Advisory Committee on Judicial Activities (1969-73); the Advisory Committee on Judicial Activities (1973-79); the Advisory Committee on Codes of Conduct (1980-87). *Guide to Judiciary Policies and Procedures,* Vol. II, Preface, p. iii. (Administrative Office of the United States Courts, 1990). Hereafter, this Committee and its predecessors will simply be called the Committee.

> been long, close and continuing, the judge's impartiality might reasonably be questioned and the judge should carefully consider recusal.[4]

A similar analysis is suggested by the Advisory Committee on Bankruptcy Rules. Its Note regarding Rule 5004(b) refers to the Note after Rule 5002(b), where very similar terms are used. The Advisory Committee's Note strongly suggests the result here. The relevant circumstances for the judge to consider when determining whether the ?connection" between the attorney and the judge is so close as to make the judge's action in the case ?improper" ?include: the nature and duration of the connection with the judge; whether the connection still exists, [or] . . . when it was terminated; and the type of . . . employment." *See* 8 *Collieron Bankruptcy*, ¶5002.04 (15th ed. 1993).

Utilizing the pragmatic approach suggested in the Advisory Committee on Bankruptcy Rules and in Advisory Opinion No. 70, I recognize that this is a relatively small court, consisting of only four judges. One of the most important factors is, as Advisory Opinion No. 70 put it: ?the period that has elapsed since the former judge left the bench"; or, as the Advisory Committee on Bankruptcy Rules put it: ?the duration of the connection with the judge; whether the connection still exists". In this case, of course, there is no break in the connection as Judge Graves still

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[4]That problem arose in this district. In *In re Fulgham Enterprises, Inc.*, 37 B.R. 577 (Bankr. E.D. Mich. 1984), Judge Bernstein followed the Committee's approach when former Judge Walker appeared in a case before him.

sits on the bench. Judge Graves and I have been colleagues for some nine and a half years. We have socialized not only in seminars and during official functions but in purely social events as well. I consider him a friend. And in determining whether an observer might reasonably question my impartiality, I must posit an observer who is aware of this relationship. *See, e.g., United States v. Chandler*, 996 F.2d 1073, 1104 (11th Cir. 1993) ("The test under Section 455(a) is whether a [] . . . lay observer fully informed of the facts on which recusal was sought would entertain a significant doubt about the judge's impartiality."); *Roberts, supra; Potashnick, supra*. I conclude, therefore, that there is a continuing close "connection" between Judge Graves and myself.

The third connection is that of Ms. Graves and the firm of which she is a partner. In Advisory Opinion No. 58, the Committee recognized the serious appearances problem which arises when a law firm which employs even an associate who is a relative of a judge appears before that judge. The opinion noted that only upon a very strict showing, including that no part of the associate's compensation is in any "manner dependent upon the result of the particular case" before the judge, and that the associate has no involvement with the case whatsoever, may the judge not recuse herself. *See also* Advisory Opinion No. 61 ("The appearance of an attorney who is a partner in a firm of which another partner is related to the judge . . . is grounds for recusal of the judge."). The rule to be derived from these opinions is that generally, it is the better practice for a judge to recuse

himself from a case if a party is represented by a law firm in which a partner is related or sufficiently ?connected" with the judge.

An analogy can also be drawn to F.R.Bankr.P. 5002(a). This Rule prohibits a judge from appointing someone as a trustee or examiner if the prospective appointee is related to the judge. At one time, Rule 5002 prohibited the judge from not only appointing a trustee or examiner but also from approving the employment of a person as the attorney for the trustee, debtor in possession or an official committee if that person was related to ?any judge of the court". Former Bankruptcy Rule 5002. It also said that ?[w]henever under this rule a person is ineligible for . . . employment, the person's firm, partnership . . . or any other form of business association or relationship, and all members, associates and professional employees thereof are also ineligible for . . . employment." While an amendment of the Rule in 1985 resulted in deleting the prohibition on approving the employment of an attorney because that attorney was related to any judge of the court, the Rule continues to recognize the general principle that when one member of the firm is ineligible, the whole firm is ineligible. *See* F.R.Bankr.P. 5002(a). It seems, therefore, that the connection between a partner and her firm is perceived to be so close that no real differentiation can appropriately be made in most cases.

And, for what it is worth, the operative term in Rule 5004(b) is ?person", which 11 U.S.C. §101(41) defines as ?including an individual, partnership, and corporation." I therefore conclude that I am so connected

with Pulliam, Graves & Fogel that it would be improper for me to approve its compensation.

That leaves the question of whether I erred in signing the order approving the employment of that firm. In my opinion, I did. Since the operative terms in both Rules 5004(b) and 5002(b)--?so connected" as to render the judge's act ?improper"--are so similar that the Advisory Committee's Note for one refers to the other, my finding that I am ?so connected" to Ms. Graves as to render it ?improper" for me to authorize compensation answers the question of whether it was also improper for me to have approved her employment.[5]

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[5]Even if I am incorrect in concluding that I should not have entered the employment order, there is no doubt that recusal under Rule 5004(b) is appropriate. According to a leading treatise,

> In a case where the judge felt that approval of employment or appointment was proper, the judge might still wish to deflect criticism by recusing himself or herself from fee award proceedings.
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> Presume, for example, that three years after leaving a firm, the judge were to approve the employment of a former partner in a small chapter 11 case. The appointment might well be proper under Rule 5002(b), but could still be subject to criticism. This criticism would be greatly reduced if the crucial aspect of the appointment--fee award--was left in other hands.
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> Sensitivity to this issue must be stressed, if only because of the long standing belief in the existence of a ?bankruptcy-ring." Whether this is truth or myth, Rule 5004(b) is an excellent tool by which the appearance of impropriety can be avoided.

8 *Collier on Bankruptcy*, ¶5004.04 (15th ed. 1993) (footnote omitted).

It is important to note in this regard that former Bankruptcy Rule 5002 established a *perse* rule which prohibited a bankruptcy judge from appointing ?an attorney . . . or other professional person pursuant to §327 or §1103 of the Code . . . a relative of any judge of the court . . . approving the employment . . .” The Advisory Committee Note to the former Rule 5002 explained that the Committee viewed the prohibition as growing out of 28 U.S.C. §458. And whether or not the Committee's interpretation of §458 was correct,[6] the fact remains that a respected group of jurists and academicians who sat as an appointed committee of the United States Supreme Court, and the Judicial Conference and Congress which approved their product, thought that the appearance of impropriety which arises when one judge of a bankruptcy court approves the employment of a relative of another judge of that court is so great--obvious even--that it necessitated a *perse* prohibition. Although the prohibition is no longer *perse*, in light of the fact that it once was, one would be hard pressed to argue that this is not a situation where a judge's “impartiality might reasonably be questioned.” 11 U.S.C. §455(a).

Although I determine that I should not have approved the employment of Pulliam, Graves & Fogel, for the reasons noted above, I think it best that another judge decide whether to set aside that order and what

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[6]28 U.S.C. §458 provides as follows: ?No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court.”

consequences flow from that decision. Accordingly, I will enter an order setting aside the show-cause order and disqualifying myself from passing upon the law firm's application for compensation.

Dated: October 4, 1993.

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ARTHUR J. SPECTOR
U.S. Bankruptcy Judge